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Supreme Court, U.S.
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In The Supreme Court of the United States

McCREARY COUNTY, KENTUCKY, ET AL.,
Petitioners,

v.

ACLU OF KENTUCKY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

Amicus adopts the factual summary as presented by Petitioner. The questions presented are:

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equally sized frames containing an explanation of the display, along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* Test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia. John W. Whitehead founded the Institute in 1982. Its mission is to educate individuals about their civil liberties and to provide free legal representation to those whose constitutional rights are violated. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases, including *Frazee v. Department of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001), and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys regularly handle First Amendment cases that concern the interplay between the Establishment Clause and the Free Speech and Free Exercise Clauses. The Institute has published educational materials and taught courses in this area as well.

The Rutherford Institute supports the Petitioners in this case because of the serious errors in the reasoning that led the Sixth Circuit to conclude that the historical document display involved in this case violates the Establishment Clause because of its inclusion of the Ten Commandments. More importantly, the Institute recognizes that this case presents the Court with a rare opportunity to correct

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[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent have been filed with this Brief. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

fundamental flaws in its Establishment Clause jurisprudence. In light of the important issues being raised in this case and their centrality to the very mission of The Rutherford Institute, the Institute respectfully requests that its arguments be heard.

STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Petitioners, State of Kentucky, and the individual petitioners.

SUMMARY OF THE ARGUMENT

The historical document display that the Sixth Circuit found to violate the First Amendment's Establishment Clause due to the inclusion of the Ten Commandments is consistent with displays that this Court has upheld against Establishment Clause challenges. The Sixth Circuit's opinion includes an unwarranted intrusion into the logic behind local government officials' choice to include the Ten Commandments in the display along with numerous secular documents. However, the court's opinion is indicative of a much greater problem: a modern Establishment Clause jurisprudence that is unworkable and yields bad results.

Amicus respectfully submits that this Court not only should reverse the decision below and uphold the particular display at issue here but, more importantly, should rework its Establishment Clause analysis in fundamental respects. *Amicus* maintains that the Court should renounce the Establishment Clause test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), abandon its practice of incorporating the Establishment Clause into the Fourteenth Amendment for

application to the states, and return to a historically accurate and logically sound application of the Clause to the federal government.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION ADOPTS A NOVEL ANALYSIS THAT CONSTITUTES AN UNWARRANTED DEPARTURE FROM THIS COURT'S DISPLAY CASE PRECEDENTS.

As Circuit Court Judge Ryan pointed out in his dissent, the County's display falls squarely within the boundaries marked out by this Court in *Lynch v. Donnelly*, 465 U.S. 68 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) for constitutionally acceptable government displays that include religious objects. *ACLU v. McCreary County*, 354 F.3d 438, 467 (6th Cir. 2003) (Ryan, J., dissenting). Therefore, this Court should uphold the display unless it chooses to effectively overrule said decisions.

Just as the Christmas season displays upheld in *Allegheny* and *Lynch* included a menorah and a crèche, respectively, among a variety of secular objects, the display now before the Court includes reproductions of the Ten Commandments among a variety of secular objects. According to the Sixth Circuit's opinion, however, whenever a local government's display includes a religious symbol or document, federal judges must engage in a searching analysis not only of the impressions the display will likely have upon observers, but also of the strength of logic behind local government officials' choices of objects to be grouped together in the display. According to the Sixth Circuit, courts must

intervene to overrule those choices if the level of "fit" between the objects is found to be less than airtight. This type of searching review is far more appropriate for a college logic or philosophy professor's review of student mid-term exams than for federal judges' review of actions by local government officials.

The Sixth Circuit bases its ruling not on the reasoning applied by this Court in *Lynch* and *Allegheny* but, rather, upon dicta from this Court's opinion in *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).[2] The court below is convinced, ostensibly based upon its reading of the *Stone* opinion, not only that "a purported historical display must present the Ten Commandments objectively and integrate them with a secular message," but also that the government entity must persuasively demonstrate an "analytical or historical connection with the other documents." *McCreary*, 354 F.3d at 448, 451. The clincher, however, is that this connection must be demonstrated in such a way as to not only be reasonable to the average observer, but to absolutely convince the most skeptical of federal judges that it is logically unquestionable.

One of the obvious problems with the Sixth Circuit's reasoning is that the holiday display upheld by this Court in *Lynch* would not have survived under the analysis applied below. The lower court's analysis focused on the asserted relationship between the Ten Commandments and the other documents displayed, as opposed to the relationship

[2] It is interesting to note that the Sixth Circuit chose to base its analysis on this Court's precedent involving the same religious object (the Ten Commandments), rather than precedents that involved similar contexts (i.e., display of religious object among secular objects).

between the Ten Commandments and the overall theme of the display. *Id.* at 451 (describing the display's "fundamental flaw" as "the lack of a demonstrated analytical or historical connection *with the other documents*.") (emphasis added). The "evidence" of historical and analytical connection presented to and examined by the Sixth Circuit led it to detect a two-fold "problem."

> One, the evidence does not appear in the actual display of the Ten Commandments, so an observer would not actually be made aware of these facts... Two, even assuming that the Ten Commandments are the sole or primary source of some laws codified by certain Colonies and State legislatures, this "fact" is irrelevant to the fundamental assertion in the display that the Ten Commandments clearly influenced the creation of the *Declaration of the* [sic] *Independence* and, thus, the formation of our country and legal tradition.

Id. at 452.

The Sixth Circuit has apparently ignored the fact that the display upheld by this Court in *Lynch* did not include any "evidence" for bystanders to examine to understand what the "connection" was between, for example, the candy-striped poles and the crèche, or between the talking wishing well and the crèche. In fact, the local government officials in *Lynch* would have been hard-pressed to present convincing historical evidence to the Court to demonstrate that a crèche is historically or analytically related to candy-striped poles or talking wishing wells.

With respect to the candy-striped poles, the Santa figure and reindeer, and perhaps a few other objects included in the *Lynch* display, the most that can be said of the "connection" between the actual objects is that people commonly associate them with the Christmas season. But the Sixth Circuit has moved far beyond the requirement that objects in a display have a casual connection to the theme of the display; instead, the Sixth Circuit has imposed a requirement that government officials demonstrate that the religious object in a display is, as a matter of historical fact, related to each individual secular object. Moreover, the Sixth Circuit's analysis would apparently not be satisfied by a tradition-based analytical or historical link. Rather, the court requires officials to prove an absolute scientific connection.

The Sixth Circuit's analysis takes an already-criticized approach to determining the constitutionality of government displays that include religious symbols and morphs it into an even more extreme inquisition. This Court's display cases have been the subject of ridicule among some judges and scholars who believe that resolution of Establishment Clause questions should not turn on the outcome of a judge's painstaking determination of whether, in light of the number of, nature of, positioning of, and distance between them, secular objects grouped with religious objects effectively insulate bystanders from any religious effects. As Judge Easterbrook once lamented:

> It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with experts testifying about whether one display is really like another, and witnesses testifying they were offended - but would have been less so were the crèche five feet closer to the jumbo candy cane."

American Jewish Congress v. Chicago, 827 F.2d 120 (7th Cir. 1987) (Easterbrook, J., dissenting). Unfortunately, the Sixth Circuit's opinion in this case demonstrates that Judge Easterbrook's fears were well-founded—not just for holiday display cases, but for any type of display that involves a religious symbol. In the words of Justice Kennedy, the type of analysis conducted by the Sixth Circuit "trivialize[s] constitutional adjudication" and "embraces a jurisprudence of minutiae." *Allegheny*, 492 U.S. at 674 (Kennedy, J., dissenting).

In *Lynch*, this Court found that

> [t]o forbid the use of this one passive symbol - the crèche - at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

Lynch, 465 U.S. at 686. Surely, the Sixth Circuit's reading of the Establishment Clause to essentially forbid displays of the Ten Commandments unless they are incorporated into some type of "secular curriculum" is an equal or greater overreaction to the Clause's mandate.

The real tragedy, however, in the Sixth Circuit's reasoning is its conclusion that the connection between the Decalogue and the other historical documents was insufficient. Just as the County argued below, the Ten Commandments are venerable instructions that have, in fact, provided the foundation for much of the legal tradition of this country. In light of not only the overwhelming historical evidence of this "connection" that the Ten Commandments in particular and religion in general have with our nation's founding, but also the ubiquitous recognition of that connection by members of this Court and many others, it is most appalling that the Sixth Circuit managed to find evidence of this fact lacking.

"It is . . . undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World." *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting). As Judge Ryan pointed out in his dissent below, "the Supreme Court has repeatedly stated that there is a crucial link between religion and our laws and government, for 'we are a religious people whose institutions presuppose a Supreme Being.'" *McCreary*, 354 f.3d at 470 (Ryan, J., dissenting) (*quoting Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). Judge Ryan also aptly acknowledged that every circuit that has considered a challenge to the public display of the Ten Commandments has recognized their foundational role in American law and government. *Id.* at 471 (Ryan, J., dissenting). "There are countless . . . illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Lynch*, 465 U.S. at 677. "The influence of religion upon American law and government is a fact of American history and politics that has been widely recognized by scholars,

jurists, legislators, presidents, and, not least, the Founders themselves." *McCreary*, 354 F.3d at 468 (Ryan, J., dissenting). The majority opinion below even acknowledges this, quoting from a Seventh Circuit opinion: "The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." *Id.* at 448 (*quoting Books v. City of Elkhart, Ind.*, 235 F.3d 292, 302 (7th Cir. 2000)).

In short, even if this Court would otherwise countenance what *amicus* respectfully submits was an entirely inappropriate inquiry by the Sixth Circuit into the logic behind the County's asserted reason for grouping the Ten Commandments with the other documents in the display, surely it cannot countenance the fact that the court's application of its own analysis fails altogether to recognize the historical fact that the Ten Commandments did, indeed, provide the groundwork for our legal and moral traditions.

Finally, the Court should reverse the decision below because the test applied by the Sixth Circuit inevitably results in hostility toward religion. The only documents or items that will ever be banished from a government display solely because of a lack of "fit" with the other items will be religious ones. This problem is apparent from the facts in this very case. Anyone playing the Sixth Circuit's game of "Which of these objects is not like the others?" would likely choose "The Star Spangled Banner" over the Ten Commandments in the context of the display considered here. It is doubtful that either the text or the melody of our national anthem played a central role in forming the "Foundations of American Law and Government."

However, the song flies under the court's radar because it is generally thought to be secular.[3]

II. THE SIXTH CIRCUIT ERRED IN BASING ITS HOLDING ON THE FACT THAT THE ORIGINAL DISPLAY CONSISTED SOLELY OF THE TEN COMMANDMENTS.

In applying this Court's *Lemon* Test to reach its conclusion that the displays it considered violated the Establishment Clause, the court below found that the display could not survive the "purpose" prong of that test because "the predominate purpose of the displays was religious." *McCreary*, 354 F.3d at 447. The court based this determination, in part, on the "evolution" of the display. Adopting the reasoning of the district court, the Sixth Circuit found that the history behind the display, which originally included only the Ten Commandments, "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint[.]" *Id.* at 457.

According to the Sixth Circuit, this inquiry into the evolution of the display is an appropriate means of evaluating the local government officials' primary purpose in creating the display because this Court considered the history behind the policy it struck as unconstitutional in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). If this is a correct reading of *Santa Fe*, then the county

[3] In fact, even "The Star Spangled Banner" includes references to our nation's religious heritage in the last stanza:
"Blest with victory and peace, may the heav'n rescued land
Praise the Power that hath made and preserved us a nation.
Then conquer we must, when our cause it is just,
And this be our motto: 'In God is our trust.'"

officials who are involved in this case are now effectively precluded from ever making use of the Ten Commandments in any capacity. For if they were to turn from this litigation and decide (for whatever reason) to incorporate the Ten Commandments into a larger curriculum of comparative religion or ethics, a use of the Decalogue of which the court would apparently approve, the Sixth Circuit is bound to point to the same evolution of the displays considered below and proclaim (in the spirit of an "Aha!") that the officials' true purpose was primarily religious. In short, if the Sixth Circuit's theory regarding the importance of the evolution of a challenged policy is correct, then the challenged government officials, once found to have had a primarily religious purpose, cannot avoid an Establishment Clause violation, even if they precisely follow the direction provided by this Court in *Stone*, *Lynch*, or *Allegheny*.

The Sixth Circuit's "taint" theory also plays a part in leading the court to conclude that the displays had the impermissible effect of "endorsing" religion. *McCreary*, 354 F.3d at 460. The panel agreed with the district court that "the history of the displays bolstered the reasonable observer's perception of the state endorsement of religion inasmuch as the observer is charged with knowing the history of the respective displays, and in each case the history indicates that the displays were originally intended to enshrine the Ten Commandments..." *Id.* at 461.

It is difficult to comprehend why the "reasonable observer" is charged with this detailed knowledge of the entire history behind a display of documents in a local government building. Yet, the Sixth Circuit assumes that he or she would be unable to grasp something so basic to American history as the importance of the Ten

Commandments to our Founding Fathers. The court believes that some detailed "curriculum" is required to explain the historical or analytical link between the Ten Commandments and other documents that are associated with our nation's Founding Fathers. While by virtue of a legal fiction the Sixth Circuit's reasonable observer is fully aware of how the local government's historical document display has changed over time, he or she is deemed completely ignorant of something that every American child knows—that most of our nation's founders were deeply religious and that the Ten Commandments were fundamental to the moral values that were echoed in the laws they created.

The Sixth Circuit cannot be forced to shoulder all the blame for the many problems inherent in its "taint" theory. The court's hand was forced by the requirement that it find some way to sift the motives of local government officials in the hope that it might discern the ratio of "secular" purpose to "religious" purpose. According to the Court's current methodology for reviewing Establishment Clause questions, a court must not only ask whether the effect of a display is, in any way, to lead to the establishment of a religion but also must ask what the officials were thinking when they constructed the display. It appears that the Court's Establishment Clause jurisprudence has thus been reduced not only to one of minutiae, but also to one of mind-reading. *See Allegheny*, 492 U.S. at 674 (Kennedy, J., dissenting) (describing the Justice Blackmun opinion as having embraced a "jurisprudence of minutiae"). A thorough review of the case now before the Court must lead the Court to question, once again, the wisdom and propriety of the *Lemon* Test. *Amicus* now turns to address that issue.

III. THE COURT SHOULD RENOUNCE THE *LEMON* TEST.

Simply stated, the *Lemon* Test is unworkable and yields bad results. The clearest evidence of this is seen in the fact that this Court has abandoned the Test when its application would have produced a ruling that the Court found inappropriate. The best example is *Marsh v. Chambers*, 463 U.S. 783 (1983).

In light of the historical data the Court considered in *Marsh*, the Court surely was correct in concluding that Nebraska's practice of maintaining a paid legislative chaplain presented "no real threat" of an Establishment Clause violation. For, as the Court recognized, "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. *Marsh*, 463 U.S. at 786. At the same time, there is simply no way that the practice could be sustained under the *Lemon* Test. In fact, Nebraska's policy of using state funds to pay a Presbyterian minister to deliver prayers at legislative sessions would likely be found to violate all three prongs of the Test if the Court had chosen to apply it.

While this Court has the freedom to apply the *Lemon* Test selectively so as to avoid reaching wrong results, lower courts do not enjoy the same discretion. The Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." However, the Court has not yet seen fit to free lower courts from the bondage that the *Lemon* Test imposed. *Lynch*, 465 U.S. at 668, 679. *Amicus* submits that this produces an intolerable state of affairs: when presented with an Establishment Clause question, every court in the nation save this one is bound to

apply a test that simply does not work in all circumstances. *Amicus* implores the Court to explicitly renounce the *Lemon* Test and to announce a new method of analysis that will produce logically and historically sound results.

As one constitutional scholar put it, under the Court's current Establishment Clause doctrine, "judges have been forced to engage in interminable parsing of the facts and circumstances of each challenge to any government action even remotely connected with religion under indefinite and shifting standards." James J. Knicely, *"First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?*, 52 Drake L. Rev. 171, 212-13 (Winter 2004).

Not only are lower courts helplessly tethered to an Establishment Clause test that cannot be trusted to produce correct outcomes, the situation becomes steadily worse as new elements of the analysis appear to emerge each time this Court decides a case involving an Establishment Clause question. For instance, an element of "audience coercion" has been added to the analysis, apparently for situations involving minors. *Lee v. Weisman*, 505 U.S. 577 (1992), *Santa Fe Indep. Sch. Dist., supra.* Indeed, many lower courts have interpreted dicta from this Court's opinion in *Edwards v. Aguillard*, 482 U.S. 578 (1987), to indicate that the Court has created a sort of second tier of scrutiny for cases involving public schools. *See id.* at 583-84 ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."). *Amicus* submits that many cases decided by lower courts have turned the entire First Amendment on its head by using the Establishment Clause to drive even private religious expression from our nation's schools. *See, e.g., Walz v. Egg Harbor Township Bd. of Educ.*, 342 F.3d 271

(3d Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 2049 (2004) (child prohibited from distributing religious pencils and candy canes to public school classmates at party); and *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003) (tiles painted by family members of Columbine victims were removed from wall murals because they depicted religious references).

As a result of this Court's own growing dissatisfaction with the *Lemon* Test, it has, at times, undertaken an application of Justice O'Connor's "endorsement test," which lower courts have begun to faithfully apply either in addition to, or as part of, the *Lemon* analysis. There appears to be uncertainty as to how the endorsement test is different from the "effects" prong of the *Lemon* Test, if at all.

Compounding the confusion created by this Court's lack of confidence in and commitment to the *Lemon* Test is the fact that lower courts must decipher the implications of *Marsh*. That case, perhaps more than any other, points to the white elephant that has been silently standing in the courtroom ever since this Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947). How can the Christian acknowledgments of God that pervade our government's history and traditions withstand the glare of the Court's modern Establishment Clause jurisprudence? *Amicus* respectfully submits that they cannot.

Yet, lower courts are forced to grapple with the disconnect in the context of a burgeoning onslaught of Establishment Clause challenges. One foothold upon which they have seized in an effort to reconcile the blatant inconsistency of the *Marsh* decision with the rest of the Court's Establishment Clause jurisprudence is the

sectarian/nonsectarian distinction. This distinction was discussed briefly in *Marsh*, but the Court in *Allegheny* suggested that it was the very basis for the *Marsh* ruling. 492 U.S. at 603 ("The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'") (*citing Marsh*, 463 U.S. at 793, n.14). The result has been a growing trend for courts to uphold religious references that are "nonsectarian," but to strike them as unconstitutional establishments if they are "sectarian."

Upon closer examination, it becomes apparent that the inconsistency is not so easily resolved because the Court has proclaimed that the Establishment Clause forbids the government to establish a "civic" religion, just as it forbids it to establish an exclusively Christian one. *See Lee*, 505 U.S. at 590 ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."); *Board of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) (noting that the principle at the heart of the Establishment Clause is that government may not prefer one religion to another, or religion to irreligion).

Moreover, any attempt to broaden the appeal of prayers or other religious references engenders the type of entanglement with religion that the Establishment Clause prohibits. For instance, the imposition of a "non-sectarian" requirement on those who offer legislative prayers requires those individuals to compose their prayers in accordance with the wishes of the government. Surely *this* is precisely what the Establishment Clause was meant to forbid. *See Widmar v. Vincent*, 454 U.S. 263, 272, n.11 (1981) (observing

entanglement problem posed by officials monitoring speech to exclude religious content).

Thus, the argument that the Establishment Clause permits "civic" religious acknowledgments but prohibits Christian ones should be rejected. If "civic" legislative prayers do not offend the Establishment Clause, then "sectarian" prayers must be equally innocuous. However, following this Court's dicta in *Allegheny*, lower courts have recently struck down sectarian legislative prayers as unconstitutional. *See, e.g., Wynne v. Town of Great Falls*, 376 F.3d 292, 298 (4th Cir. 2004) ("*Marsh* and *Allegheny* also teach that a legislative body cannot, consistent with the Establishment Clause, 'exploit' this prayer opportunity to 'affiliate' the Government with one specific faith or belief in preference to others."); *Rubin v. City of Burbank*, 101 Cal.App.4th 1194, 1203 (2000) ("The court's discussion of *Marsh* in *Allegheny* reflects that it considered the removal of references to Christ to have been essential to the *Marsh* ruling..."), *cert. denied*, 538 U.S. 1034 (2003).

Perhaps the greatest problem with a proposed "non-sectarian" requirement is that it enhances, rather than diminishes, the likelihood that observers will perceive government favoritism toward particular religions. If a prayer directed to "Jesus" is considered "sectarian" and, thus, is prohibited but a prayer directed to "God" is considered "non-sectarian" and, thus, is permissible, then the government evinces favoritism toward religious individuals who believe in "God" but do not believe that "Jesus" is God. How would prayers mentioning Allah be treated under a policy that allows only "non-sectarian" prayer? Such prayers certainly indicate a preference for a particular religion.

As it turns out, in most instances "sectarian" is code for expression that dares mention that most controversial of figures, Jesus Christ. As Justice Kennedy once wrote,

> If there be such a person as the "reasonable observer," I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least favored faiths so as to avoid any possible risk of offending members of minority religions.

Allegheny, 492 U.S. at 677 (Kennedy, J., dissenting).

In short, this emerging trend of staking constitutional adjudications upon whether religious speech is "sectarian" or "nonsectarian" is just an example of how the Court's current methodology of Establishment Clause analysis has steered the nation's judiciary onto an analytical path that is not only logically unsound, but also leads toward serious violations of the Establishment Clause and even toward religious discrimination. *Amicus* respectfully submits that the old maxim "better late than never" is appropriate here; the Court should renounce the *Lemon* Test and rework its method of evaluating Establishment Clause cases.

IV. The Court Should Discontinue Application of the Establishment Clause to the States Through the Fourteenth Amendment and Return To a Historically Accurate Application of the Clause.

As demonstrated above, and as this Court is no doubt well aware, its Establishment Clause analysis is in desperate need of overhaul. *Amicus* submits that there is only one way to ensure appropriate outcomes and remove the federal judiciary from the quagmire that inevitably results from an Establishment Clause test that requires judges to dissect the motives behind and effects of every action by state and local governments that mentions or involves religions. *Amicus* respectfully submits that the only way to untangle the web that now confronts courts deciding Establishment Clause questions is to return the Clause to its rightful place in the structure of our Bill of Rights by discontinuing application of the Establishment Clause to the states through the Fourteenth Amendment and by applying it to the federal government in a way that is consistent with the original intent of its drafters.

A. The Court Should Discontinue Applying the Establishment Clause to the States by Operation of the Fourteenth Amendment.

In 1947, Justice Hugo Black authored an opinion that, in effect, forced a square peg into a round hole by applying the Establishment Clause for the first time against state governments. *Everson, supra*. *Amicus* submits that the glaring logical flaws in the reasoning behind this doctrine compel the Court to overturn it. Only then can the Court start afresh in creating a reasonable and workable methodology for applying the Establishment Clause.

As with the other parts of the Bill of Rights that were held to have been incorporated through the Fourteenth Amendment for application to the states, the Establishment Clause originally applied only to the Federal government. But important considerations far beyond the mere fact that the Establishment Clause was not originally intended to apply to state governments strongly counsel against the incorporation doctrine with respect to this Clause.

While the nature of the other basic liberties incorporated into the Fourteenth Amendment make the Court's incorporation doctrine, in general, a natural extension of the Bill of Rights, application of the Establishment Clause against the states effectively turns the Clause on its head. This is because the other incorporated rights are guarantees of personal liberties to individuals, while the original purpose of the Establishment Clause was to restrain the federal government from interfering with state laws respecting religion and, indeed, with the numerous state establishments of religion that then existed. *See School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 309-310 (1963) (Stewart, J., dissenting) ("The Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments."). As pointed out by one scholar:

> The key point is not simply that, as with the rest of the First Amendment, the establishment clause limited only Congress and not the states. As we have seen, that point is obvious on the face of the Amendment, and is confirmed by its legislative history. ... Nor is the main point exhausted once we recognize that state governments are in part the special beneficiaries of,

> and rights-holders under, the clause. As we have seen, the same thing could be said, to some degree, about the free speech clause. The special prick of the point is this: the nature of the states' establishment clause right against federal dis-establishment makes it quite awkward to "incorporate" the clause against the states via the Fourteenth Amendment. ... [T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion – a right explicitly confirmed by the establishment clause itself!

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1158 (March 1991). Thus, while there is much wisdom in applying the other guarantees of liberty to state and local governments, the logic of applying the Establishment Clause to them is dubious, at best. In the words of another constitutional scholar:

> The text of the Establishment Clause is transparently "structural," prohibiting a federal establishment of religion and granting no distinct liberty interest other than to be free from a federally established religion, an interest that is adequately protected by the First Amendment itself. At the time of its adoption, the Clause not only barred the federal government from changing the religious status quo in the states, it actually vested in the states, in conjunction with the Tenth Amendment, the power to regulate religion.

Knicely, 52 Drake L. Rev. at 175.

The *Everson* opinion did not stop at its confounding conclusion that the Establishment Clause should apply

against the states; it went on to interpret the Clause to, among other things, prohibit any government from giving aid or preference to any or all religions. 330 U.S. at 511. In one fell swoop, the Court held that states that had officially established religions at the time of the First Amendment's enactment were, by virtue of that Amendment, prohibited from so much as expressing a preference for religion over non-religion. The Establishment Clause was thus stretched beyond recognition in terms of both scope and meaning.

The result of the incorporation of the Establishment Clause into the Fourteenth Amendment, together with the strict separationist interpretation of the Clause announced in Black's opinion, has been the schizophrenic "separation of church and state" jurisprudence that now governs the increasingly common challenges to anything religious that appears in public.

> [J]udges have been forced to engage in interminable parsing of the facts and circumstances of each challenge to any government action even remotely connected with religion under indefinite and shifting standards. Certainty in the law has been undermined and understanding of the law by the citizenry and government has been obfuscated. *Everson*'s mandates have also led to countless assertions by separationist proponents and social gadflies wielding the Establishment Clause as a sword to extirpate the religious viewpoint from American public life under the banner of the ostensible right to be free from religion. Likewise, opponents of separation have solicited popular support in attempts to force confrontations with *Everson*'s mandates.

Knicely, 52 Drake L. Rev. at 212-13.

Those who fear that discontinuation of incorporation of the Establishment Clause into the Fourteenth Amendment would result in widespread persecution of religious minorities should find solace in the strong arms of the Equal Protection and Due Process Clauses. The Fourteenth Amendment effectively insulates religious minorities from discrimination by subjecting classifications relating to religion to strict scrutiny. *Id.* at 220. Additionally, state constitutions will continue to protect religious liberties. The Establishment Clause, however, was never intended to be a panacea for every form of religious discrimination at every level of government. The attempt to interpret it as such has produced confusion and provided a foothold for hostility toward religion.

Amicus respectfully submits that nothing short of the dramatic step of discontinuing the incorporation of the Establishment Clause into the Fourteenth Amendment will cure the hopelessly muddled condition of modern Establishment Clause jurisprudence. Moreover, an intellectually honest analysis of the logic underlying the incorporation doctrine with respect to this particular Clause demands nothing less than wholesale abandonment of the doctrine in Establishment Clause cases.

B. When Applying the Establishment Clause to the Federal Government, the Court Should Return to a Historically Accurate Interpretation of the Clause.

Amicus respectfully submits that the Court cannot turn a blind eye to the glaring inconsistency between the official recognitions and endorsements of Christianity that abounded in our nation's history before and after the enactment of the Establishment Clause and the demand of absolute governmental neutrality toward religion and irreligion that modern judges have been charged with enforcing. *Amicus* will not here belabor the tomes of historical data that point to the undeniable conclusion that the Establishment Clause was never intended to prohibit either personal religious expression by government officials or recognition of the historical fact that Christian values were fundamental to our nation's founders.

It would indeed be difficult for anyone to argue that the First Amendment mandates a "secular political culture" in light of the fact that our nation's history and traditions are replete with references to God. Our Declaration of Independence acknowledges the Creator who has endowed all people with unalienable rights. Our national motto is, "In God We Trust." The Pledge of Allegiance declares that we are "one nation under God." Acknowledgments of God are events common to our national landmarks. The peak of the Washington Monument proclaims "Praise Be to God" in Latin, and several tribute blocks lining the Monument's stairway are inscribed with biblical passages. The Jefferson Memorial contains at least four inscriptions that express religious sentiments, including "God who gave us life gave us liberty." And the Liberty Bell is inscribed with the words of Leviticus 25:10. These are all indelible indications that our government has never been "neutral" toward religion and irreligion.

These venerable national traditions simply cannot withstand a straight-faced analysis under the *Lemon* Test or any Establishment Clause doctrine that requires government to maintain a strict neutrality between religion and irreligion. Nor can a paid legislative chaplaincy or the prayers that traditionally open legislative and court sessions withstand such analysis.

The Court should abandon any attempt to rescue these, our nation's cherished traditions, from the relentless jaws of an Establishment Clause jurisprudence that bears little similarity to the Clause as it was actually conceptualized and drafted. *Amicus* implores the Court to embrace instead the original intent of the drafters with respect to the Clause.

As Justice Kennedy has explained:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring

> government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

Allegheny, 492 U.S. at 657-58 (Kennedy, J., dissenting).

Amicus submits that the path of declaring that certain historical recognitions of God have achieved a sort of adverse possession of constitutional legitimacy by virtue of their ancient roots in our national traditions is altogether unsatisfactory. As the Court recognized in *Marsh*, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees..." The guarantees of our Bill of Rights are far too precious to be trumped by tradition. The only way to reconcile the Establishment Clause with the recognitions of religion in general and Christianity in particular that pervade our nation's historical documents, traditions, and landmarks is to embrace the fact that the Clause never precluded such recognitions. And if it did not then, it cannot now.

CONCLUSION

The display that the Sixth Circuit struck as unconstitutional is consistent with this Court's precedents involving displays that include a religious object among secular objects. However, the errors in the judgment below merely point to the greater problems inherent in the Court's modern Establishment Clause jurisprudence. *Amicus* respectfully submits that the doctrine announced in the Court's 1947 *Everson* decision was based on fundamental interpretive and logical errors, and, for that reason, the methodology of Establishment Clause analysis derived from *Everson* should be abandoned. Therefore, the Court should discontinue incorporating the Establishment Clause into the

Fourteenth Amendment for application against the states and return to a historically accurate and logically sound interpretation of the Clause.

Respectfully Submitted,

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